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IN THE

Supreme Court of the United States

October Term, 1961

No. 534

AMERICAN RESEARCH COUNCIL, INC. and BERNARD MAZEL,

Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered in the above case on July 7, 1961, as amended by an order of the said Court, dated October 5, 1961.

Opinions Below

The opinion of the Supreme Court of the State of New York, New York County, is not officially reported, but is unofficially reported in 210 N. Y. S. 2d 332. The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 13 A. D. 2d 75, 213 N. Y. S. 2d, 108. The opinion of the Court of Appeals of the State of New York has not been

officially reported. Copies of the opinions in the New York State Courts are appended to this petition in the Appendix at pages 12 to 31 inclusive.

Jurisdiction

The opinion and judgment of the Court of Appeals of the State of New York, as amended by an order of the said Court made and entered on October 5, 1961, were made and entered on July 7, 1961. A copy of the said judgment, as amended, is appended to this petition in the Appendix at pages 9-11. An order of Mr. Justice Harlan of this Court extending petitioners' time within which to file their petition for certiorari up to and including November 6, 1961 was made and entered on October 9, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

Question Presented

Whether the amendment of 1960 to Article 23-A of the New York General Business Law, construed by the New York Court of Appeals to apply to the book here in issue, constitutes an unwarranted invasion into freedom of the press in violation of the First and Fourteenth Amendments of the Constitution of the United States.

Statute Involved

The pertinent portions of Article 23-A of New York General Business Law are set forth in the Appendix at pages 31 to 35.

Statement

In May, 1960, petitioner, American Research Council, Inc., published a book entitled "How I Made Two Million Dollars In The Stock Market", by Nicolas Darvas. That book was, and purported to be, no more than an account by Darvas of his experiences in the stock market between 1953 and 1959. The book did not recommend or advise the purchase of any security. It did not recommend or advise the holding or sale of any security. It did not purport to state the value of any security. It made no forecasts as to the future of any security. It merely spoke of the author's experiences in the stock market in the past. It was his story—his autobiography. The nature of the book has been perhaps most aptly described by Chief Judge Desmond of the New York Court of Appeals as an "autobiographical work describing in the manner of Rockefeller, Carnegie, Vanderbilt, Baruch, *et al.*, a series of profitable stock deals".* (Appendix, p. 17).)

In 1960, Article 23-A of the New York General Business Law was amended to give the Attorney General of the State of New York jurisdiction to proceed against any misrepresentation, false pretense, deception or fraud relating to investment advice by means of a preliminary injunction, a permanent injunction and or criminal proceedings. Claiming to act under the provisions of the said amendment, the Attorney General, in December 1960, secured an *ex parte* order from a Justice of the Supreme Court of the State of New York which directed the petitioners to appear for examination and to produce various

* It should be noted that this characterization of the book has been expressly or impliedly subscribed to by all of the New York State Courts and Judges who participated in these proceedings, including those Judges who voted with the majority in the New York Court of Appeals.

records relating to the said book. This order was obtained pursuant to Section 354 of the aforesaid Article 23-A, which required that the Attorney General represent, and he did so represent, that he was about to commence an action for an injunction; that the said book was investment advice under the statute; and that the said book contained misrepresentations such as the allegation that the Attorney General believed that the author had made only $200,000 instead of the $2,000,000 which he recites in his book.

Immediately after service thereof upon them, petitioners moved to vacate the said *ex parte* order which had been obtained by the Attorney General. The basic argument of the petitioners—an argument which was raised in, presented to and argued before all the state courts in New York—was two-pronged:

1. Petitioners urged that Article 23-A, properly construed, did not authorize the Attorney General to inquire into or proceed against a book, such as the one here in issue, which was, and purported to be, no more than an autobiographical narrative of one person's activities in the stock market.

2. Petitioners further argued that, if Article 23-A, as amended, were construed to permit the Attorney General to inquire into and proceed against such a book, the said statute was unconstitutional in that it impinged upon the guarantees of a free press set forth in the First and Fourteenth Amendments to the Constitution of the United States, and in Article I, Section 8 of the New York State Constitution (R. 8-9).

The New York Supreme Court, at Special Term, vacated the *ex parte* order obtained by the Attorney General on the ground that the Attorney General had no jurisdiction under Article 23-A to investigate, inquire into or proceed

in any other way against the said book, its author or publisher. The Court held that the actions of the Attorney General constituted "an unwarranted invasion of the free press in violation of the Fourteenth Amendment of the Federal Constitution and Article 1, Section 6 of the State Constitution" (R. 61). The Supreme Court further held that it would place the power of censorship in the hands of the Attorney General over publications such as the biography of Bernard Baruch and publications unrelated to specific stocks or bonds but which espouse certain guiding principles of investment.

The decision of the New York Supreme Court at Special Term was affirmed by the Appellate Division of the said Court upon the ground that the Attorney General had no jurisdiction under Article 23-A to inquire into the said book. In view of this finding, it did not reach or decide the federal constitutional question which had been raised.

Upon appeal to the New York Court of Appeals, that Court, in a four-to-three decision, reversed the decisions of the Courts below and held that the Attorney General had the right under Article 23-A to proceed against the book here in issue. The majority of the Court of Appeals held that Article 23-A of the General Business Law, as so construed, was constitutional and did not violate the guarantees of a free press set forth in the First and Fourteenth Amendments of the United States Constitution (Appendix, pp. 10-11). The three dissenters, in an opinion by Chief Judge Desmond, reiterated Special Term's opinion that the Attorney General's construction of Article 23-A would give him censorship or suppression power over any writing which described stock transactions or investment principles.

It is this question which the petitioners now seek to have this Court review.

Reasons for Granting Writ

This statute may be distinguished from those which involve obscenity or sedition, wherein carefully delineated and narrow areas have been carved out as exceptions to our constitutional guarantee of freedom of the press.

The statute, here in issue, creates censorship and suppression power over

1) any biography or autobiography which discusses or describes stock market experiences, stock transactions or investment principles such as biographies or autobiographies of Bernard Baruch, Rockefeller, Carnegie, and the book here in issue;

2) any work of fiction which refers to or includes, in its narrative, stock transactions, stock market operations or investment principles;

3) any treatise or text which describes investment principles.

The statute here in issue subjects the above specified books and writings to censorship and suppression by means of an *ex parte* preliminary injunction (N. Y. Gen. Bus. Law §354), a permanent injunction (N. Y. Gen. Bus. Law §353), and criminal proceedings (N. Y. Gen. Bus. Law §358), whenever they contain any false, deceptive or misleading statements.

This statute violates the guarantees of the First Amendment, incorporated in the due process clause of the Fourteenth Amendment, in that:

1) it imposes a prior restraint upon the publication and distribution of books and writings;

2) it authorizes the issuance of an *ex parte* preliminary injunction before an action is commenced by the Attorney General (upon the representation that he is about to commence an action), without a hearing and without any provision for an immediate or early trial and judicial determination;

3) it permits the control and suppression of ideas and beliefs by a government official's opinion of what is a true principle or belief and what is a false principle or belief.

The dangers inherent in this statute were clearly perceived by the justice at Special Term and by the three dissenting judges in the New York Court of Appeals, when they characterized the censorship and suppression powers granted to the Attorney General as an unwarranted invasion of the free press in violation of the Fourteenth Amendment of the Federal Constitution.

The question herein presented is of vital and recurring significance. The nature of the constitutional right and the effect of the decision of the New York Court of Appeals make this case a singularly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

MILTON A. BASS,

.....

SOLOMON H. FRIEND,

.....

HAROLD FRIEDMAN,

Attorneys for Petitioners.

APPENDIX

Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July, in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS: The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur July 7, 1961

In the Matter of

An Inquiry by the Attorney General of the State of New York pursuant to Article 23-A of the General Business Law of the State of New York, &c.

AMERICAN RESEARCH COUNCIL, INC. & ano.,
Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Appellant.

Be it remembered, That on the 28th day of April, in the year of our Lord one thousand nine hundred and sixty-one, Attorney General of the State of New York, the appellant—in this cause, came here unto the Court of Appeals, in person, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And American Research Council, Inc. & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Bass & Friend, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Samuel A. Hirshowitz, of counsel for the appellant—, and by Mr. Milton A. Bass, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein, with costs in this Court and in the Appellate Division. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.; Petitioners-respondents contended that to construe Article 23-A of the General Business Law of the State of New York to permit the Attorney General to inquire into a book, such as the one in issue, rendered Article 23-A unconstitutional because it infringed on the guarantees of free press set forth in the First and Fourteenth Amendments. The Court of Appeals held that

Article 23-A of the General Business Law as construed was constitutional.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE.)
Albany, July 7, 1961.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ RAYMOND J. CANNON
Clerk

Opinion of New York Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

No. 160

In the Matter of

An Inquiry by the Attorney General of the State of New York pursuant to Article 23-A of the General Business Law of the State of New York, &c.

AMERICAN RESEARCH COUNCIL, INC. & ano.,
Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Appellant.

FROESSEL, J.:

Petitioners-Respondents herein were, by an *ex parte* order, directed to appear in court with certain books and papers for examination under the so-called Martin Act (General Business Law, Art. 23-A). Said order was thereafter vacated at Special Term, and the Appellate Division by a divided court affirmed. Additional background of this litigation is aptly set forth in the Chief Judge's opinion.

The power of the Attorney General under the Martin Act is exceedingly broad. Indeed, as Judge Cardozo said in *Matter of Ottinger*, 240 N. Y. 435, 439, the Attorney

General "almost upon mere request * * * may have an examination before trial of parties or of witnesses" in a Martin Act Investigation. In *People v. Federated Radio Corp.*, 244 N. Y. 33, we stated (38-39):

> "In a broad sense the term [fraud] includes all deceitful practices contrary to the plain rules of common honesty.
>
> The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited. (*Hall v. Geiger-Jones Co.*, 242 U. S. 539.) The words 'fraud' and 'fraudulent practice' in this connection should, therefore, be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law."

(See also *Edge Ho Holding Corp.* 256 N. Y. 374, 381; *Matter of La Belle Creole International S. A. v. Attorney General of the State of New York*, decided herewith.)

In our opinion there was a sufficient showing for the issuance of the order vacated so as to allow the Attorney General to inquire "concerning their [petitioners'] practices, transactions and courses of business relating to the *promotion, issuance and distribution of investment advice* within and from the State of New York" (emphasis supplied), as specifically provided in said order. [See General Business Law, §§ 352, 354.]

The corporate petitioner is a stock corporation. It is registered with the Securities & Exchange Commission

as an "investment adviser", pursuant to the Federal Investors Advisory Act of 1940 (15 USC, § 80-b). That means "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, * * * as to the advisability of investing in, purchasing or selling securities" [id., subpar. 2(11)]. (See also General Business Law, § 359-eee.)

The corporate petitioner published Darvas's book, and received compensation by way of a financial profit from every book sold at $4.95. It did more, however, than publish the book. It extensively advertised and conducted a mail order campaign to high-pressure sale of the book "as a guide to every individual investor". In its advertisement it stated:

> "We think the Darvas method will make *more and more profits* for you as time goes by. Therefore, we make this additional guarantee: EVEN IF YOU KEEP THE BOOK, YOU ARE FREE TO RETURN IT ANY TIME FOR A FULL YEAR AND RECEIVE UNQUESTIONED REFUND if you are not completely satisfied with your *Improved Investment results*. Thus, you are doubly protected—return your free examination voucher today." (Only italics supplied.)

It is claimed that the very title of the book was misleading, for the chief securities accountant of the securities division of the Attorney General's office asserted that it overstated Darvas's alleged profits by multiplying them ten times. The individual petitioner, Mazel, is president of the Council, and upon being subpoenaed by the Attorney General invoked his privilege against self-incrimination.

The Appellate Division did not agree with all the reasoning of Special Term. It recognized, however, that not

only the book, but the "other material, including advertisements published by the Council", should be considered along with the publication. As to the book, it stated, when "fairly considered in its entirety it described certain methods used in specific transactions, actual or *fictional*, which turned out successfully for the author" (emphasis supplied).

In our opinion, the courts below have applied to the merely inquisitorial order the measure of proof that would be required at a trial. We should not so narrow the scope of the Attorney General's power under Article 23-A of the General Business Law.

The order appealed from should be reversed, and the *ex parte* order reinstated, with costs.

DESMOND, Ch. J. (dissenting):

In December 1960 an ex parte order was made by Special Term under section 355 of the General Business Law requiring Nicolas Darvas, American Research Council, Inc., publisher of a book written by Darvas, and Bernard Mazel, president of American Research Council, to appear in the court to be examined and to produce relevant papers, records, etc., concerning alleged fraudulent practices "relating to the action which the Attorney General has determined to bring * * *" including all papers and records in regard to the activities of Darvas, Research Council and Mazel "concerning their practices, transactions and courses of business relating to the promotion, issuance and distribution of investment advice within and from the State of New York * * *." At the same time a notice to appear and a subpoena was served on Research Council and Mazel but apparently not on Darvas. The procedure followed was that described in section 354 of the General Business Law (which section is part of the so-called

"Martin Act") authorizing the Attorney General, whenever he has determined to commence an action under the Martin Act, to present to any Supreme Court Justice an application for such examination. The Martin Act is Article 23-A of the General Business Law which is headed "Fraudulent Practices in Respect to Stocks, Bonds and *Other Securities*" *and in general authorizes investigation* of, and criminal and civil suits because of, frauds in dealings in securities. The whole attack of the Martin Act is against stock frauds of various kinds and, while the sections are very broad in terms and give the Attorney General broad powers of investigation, their coverage is limited to fraudulent practices in regard to securities. We agree with the courts below that there is nothing in these papers to show any such fraudulent practices and so no basis appears for the inquiry.

It was not until 1960 (ch. 961, § 3, eff. July 1, 1960) that there was added to the Martin Act section 359-eee requiring the registration with the State Law Department of "investment advisors" and prohibiting anyone from engaging in that business without such registration. "Investment advisor" is closely defined in section 359-eee to include persons who *for compensation* engage in the *business* of *advising* members of the public, directly or through writings, as to the *value* of securities or the *advisability* of investing or buying or selling securities, etc. All that Darvas did was to write a book, which American Research Council published and which became a best seller, entitled "How I Made $2,000,000 in the Stock Market" and in which Darvas, a professional dancer, wrote an account of his actual or purported experiences in the stock market. The Martin Act should not be and cannot reasonably be construed to deal with such a book. We do not think the Legislature ever intended that the Attorney General should use his investigatory powers to stop or slow up

the sale of such a book in order to protect venturesome people from their urges to gamble in stocks.

This proceeding was brought on by a motion made by American Research Council and its president Mazel for the vacatur of the ex parte order. The motion was based on an affidavit of respondents' attorney who denied the authority of the Attorney General to proceed with reference to this book since, according to the affidavit, an "investment advisor" is a person who for "compensation" engages in the business of advising members of the public as to the value or advisability of "investing, purchasing, selling or holding" securities. Neither the Council nor Darvas nor the book, argues the affidavit, has done anything like that. The book, as the affidavit correctly says, is simply an autobiographical work describing, after the manner of Rockefeller, Carnegie, Vanderbilt, Baruch et al., a series of profitable stock ventures, and there is nothing to show any fraudulent purpose or fraudulent act. In opposition there was filed an affidavit of an Assistant Attorney General. Among other things, the latter pointed out, citing *Matter of Ottinger* v. *Civil Service Comm.* (240 N. Y. 435) and *People* v. *Federated Radio Corp.* (244 N. Y. 33), that the Attorney General has power to investigate anything which looks like a fraudulent practice and that a showing of materiality or relevance is not a prerequisite (see *Matter of Edge Ho Holding Corp.*, 256 N. Y. 374). This affidavit shows that in promotional material for the book the publisher made statements that the Darvas method would make profits for readers and would serve as a useful guide to investors, etc. But there is a vast difference between selling definite investment advice and trying to get sales for a book by asserting that it will help readers make money. We find nothing in this book advising anyone to do anything although, of course, like every other biography of a successful

trader, it may suggest that the wise reader will go and do likewise. Completely absent is any showing of a fraudulent intent unless self-laudation and boasting of one's cleverness is somehow a fraud.

Special Term granted the application to set aside the ex parte order. In its opinion it said that the aim of the proposed examination by the Attorney General "is conceded to be the suppressing of the publication and further distribution" of the book. In its affirming Per Curiam opinion the Appellate Division wrote that it found in this record no such concession. That is correct but we were told on the argument by respondents' counsel that this concession was made orally at Special Term and the Assistant Attorney General who argued the appeal in our court did not deny this. The Special Term opinion points out that respondent American Research Council, Inc., has for some reason registered itself as a professional investment advisor with the United States Securities and Exchange Commission but it still remains that there is nothing before us to show that it ever actually engaged in the business of giving investment advice, as distinguished from publishing this book. Certainly the book does not constitute "investment advice" within any reasonable meaning of the term. The Special Term opinion said correctly that there is a real difference between "touting" stocks and publishing as a biographical sketch a narrative of a series of transactions by a named investor. The lower court remarked that the Attorney General's construction would give him censorship or suppression power over any writing which describes stock transactions or investment principles. To repeat, this book does not make any recommendations of any kind.

The Appellate Division's opinion takes the same ground as did Special Term. One Justice dissented. He wrote

that the Attorney General, before the enactment of the 1960 amendment, had power to proceed against persons "responsible for investment advice that fell within the fraudulent practice proscription of the Martin Act". But nowhere in his opinion do we find any explanation as to how the writing and publication of this biography could be considered to be a "fraudulent practice" under the Martin Act.

The order should be affirmed, with costs.

* * * * *

Order reversed and the matter remitted to Special Term for further proceedings in accordance with the opinion herein, with costs in this Court and in the Appellate Division. Opinion by Froessel, J. All concur except Desmond, Ch. J., who dissents in an opinion in which Van Voorhis and Burke, JJ., concur.

Opinion of Supreme Court, Appellate Division, First Department

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

March 1961.

CHARLES D. BREITEL, JP.,
FRANCIS L. VALENTE,
JAMES B. M. McNALLY
ARON STEUER,
EARLE C. BASTOW, JJ.

3432

In the Matter of

An Inquiry by the Attorney General of the State of New York, pursuant to Article 23-A of the General Business Law of the State of New York, in regard to the activities of:

NICOLAS DARVAS,
AMERICAN RESEARCH COUNCIL, INC., and
BERNARD MAZEL

concerning practices, transactions and courses of business relating to the promotion, issuance and distribution of investment advice within and from the State of New York.

AMERICAN RESEARCH COUNCIL, INC. and
BERNARD MAZEL,
Petitioners-Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondent-Appellant.

Appeal from order of the Supreme Court at Special Term (Epstein, J.), entered January 12, 1961, in New York County, which vacated an ex parte order directing petitioners, at the instance of the Attorney General, to appear for examination and produce certain books and records.

Milton A. Bass, of counsel (Bass & Friend, attorneys) for Petitioners-Respondents.

Samuel A. Hirshowitz, of counsel (Daniel M. Cohen and Philip Weinberg with him on the brief; Louis J. Lefkowitz, Attorney General of the State of New York) for Respondent Appellant.

Per Curiam:

This appeal brings up for review an order vacating a prior order granted ex parte directing the respondents to appear in court at a stated time and place with certain described books, papers and records for examination "concerning their practices, transactions and courses of business relating to the promotion, issuance and distribution of investment advice within and from the State of New York" since January 1, 1953.

In the summer of 1960 the corporate petitioner published a book purportedly written by one Darvas under the title "How I Made Two Million Dollars In The Stock Market." Thereafter the appellant, The Attorney General, commenced an investigation under the provisions of Article 23-A of the General Business Law, commonly referred to as the "Martin Act". It is unnecessary to detail the ensuing proceedings but it may be gathered from the record that the conclusion of the Attorney General as stated in an answering affidavit that "he has not been much aided by the publisher, American Research

Council, Inc." had a factual basis. Among other things, the president of the Council appeared before the Attorney General in November, 1960 and invoked his privilege against self-incrimination when asked a series of questions concerning his knowledge of the circumstances surrounding the publication of the book.

These considerations aside, we must decide whether the book and other material, including advertisements published by the Council, when considered together, come within the purview of the statute so that the Attorney General has power and jurisdiction to proceed. Section 352 of the General Business Law, among other things, empowers the Attorney General to conduct a preliminary investigation whenever any person engages in "any practice or transaction or course of business relating to * * * investment advice * * * which is fraudulent or in violation of law and which has operated or which would operate as a fraud upon the purchaser * * *." Section 359-eee as added by chapter 961 of the Laws of 1960, among other things, defines an "investment advisor" as one "who, for compensation, engages in the business of advising members of the public, either directly or through publications or writings within or from the state of New York, as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities * * *."

Turning to the book in question we agree with the conclusion reached by Special Term that fairly considered in its entirety it describes certain methods used in specific transactions, actual or fictional, which turned out successfully for the author. The publication and the accompanying promotional advertisements are not "investment advice" within the meaning of the statute but certain theories of investment purportedly adopted and followed by the author.

We do not find in this record, however, any concession, as stated by Special Term in its opinion, that the aim of the appellant was to suppress the book. Therefore, we do not reach, pass upon or approve so much of the opinion of Special Term as characterized the use of the Martin Act by the Attorney General or decided that his actions constituted a violation of any provision of Federal or State Constitutions.

The order appealed from should be affirmed.

All concur except Valente, J. who dissents and votes to reverse in dissenting opinion.

Valente, J. (dissenting):

I dissent and would reverse the order and permit the Attorney General's investigation to proceed.

The majority opinion affirms the conclusion of Special Term that in the promotion and sale of the Darvas book the American Research Council, Inc. (Council) and its president were not engaged in giving any "investment advice" and for that reason the Attorney General may not investigate their activities under section 352 of the General Business Law. Consideration of this appeal must commence with the factually well-supported assumption that the investigation embarked upon by the Attorney General is not designed to suppress the publication and distribution of the Darvas book, but to determine whether there is a basis for injunctive relief against fraudulent practices in connection with the publishing, promotion and sale of the book.

Initially, the record shows that the Council was registered with the Securities and Exchange Commission as an "investment advisor" and has been so registered since 1956 pursuant to the Federal Investors Advisory Act of

1940 (15 U. S. C., §80b). The order which the Attorney General obtained pursuant to section 354 of the General Business Law was based on affidavits by the Attorney General averring, among other things, that the Council was in the business of investment advice, was registered as an investment adviser under the federal statute, had conducted an extensive advertising and mail order campaign in connection with the book and had made misleading references on the book jacket. Since, in the words of Cardozo, J., in *Matter of Ottinger* v. *Civil Service Corp.*, 240 N. Y. 435, 439, the Attorney General "almost upon mere request [he] may have an examination before trial of parties or of witnesses" in an investigation under the Martin Act, there was certainly a sufficient basis averred here to secure an order for the examination of the Council and its principal officer with regard to their activities in connection with the Darvas book. It was not necessary for the Attorney General, at this stage of the proceedings, to establish his right to any particular relief in any subsequent action.

Both the majority opinion and that of Special Term make reference to the chapter 961 of the Laws of 1960 which added to section 352 of the General Business Laws the words "investment advice", added a new section 359-eee defining an "investment advisor" and provided for the registration of investment advisors. However, there can be no doubt that before the enactment of chapter 961 of the Laws of 1960, the Attorney General had the power to proceed against persons responsible for investment advice that fell within the fraudulent practice proscription of the Martin Act. The provisions of the 1960 amendments unquestionably were introduced to require the registration of "investment advisors"; and having required the registration of the persons defined in section 359-eee, it was deemed suitable to refer specifically to

"investment advice" and "investment advisors" in other sections of Article 23-A of the General Business Law. Obviously, the requirement of registration was designed to facilitate regulation by furnishing the identity of any person in the field. It perverts the purpose of the enactment to hold that a person engaged in practices that might otherwise be deemed to fall within the Martin Act concept of a "fraudulent practice", may be permitted to roam the securities market or field of investment advice, freed from any possible restraint by the Attorney General because such person is either non-registered or not subject to registration requirements. Hence, the provisions of section 352 cannot reasonably be deemed to be limited by the definition of "investment advisor" contained in section 359-eee.

The Martin Act created a comprehensive scheme for the protection of the public from misleading representations in the field of securities (see *People* v. *Federated Radio Corporation*, 244 N. Y. 33). Deceitful practices may assume a myriad of forms, but so long as they may have a tendency to deceive or mislead the purchasing public, the Attorney General should not be hampered in an attempt to uncover a "fraudulent practice". On the record before us, there was a sufficient basis for the Attorney General to proceed in his investigation; and that inquiry should not have been aborted by vacating the order obtained pursuant to section 354 of the General Business Law.

Opinion of Supreme Court, New York County

MR. JUSTICE HENRY EPSTEIN

Matter of Attorney-General of the State of N. Y. (Darvas)—This is a motion to vacate and set aside the ex parte order of a Justice of this court dated December 7, 1960, which directed the examination of the moving parties, their books, papers, &c., by the Attorney General of the State of New York under section 354 of the General Business Law of this state. The issues raised have been fully argued and briefed. Article 23-A of the General Business Law is more generally known as the Martin Act, this state's counter-part to the Federal Securities' Exchange Commission (S. E. C.). The aim of the proposed examination of the Attorney General is conceded to be the suppressing of the publication and further distribution of a book entitled "How I made $2,000,000 in the Stock Market". The book is purportedly authored by one Nicolas Darvas, a professional dancer, and published by the petitioner American Research Council, Inc., of which petitioner Bernard Mazel is president. At the request of the Attorney General respondent corporation furnished original cables referred to in the book. Bernard Mazel appeared under subpoena pursuant to section 352 of the General Business Law with documents but refused to be sworn on the ground that his testimony would be under "testimonial compulsion" and pleaded his constitutional privilege. The prospective injunctive relief envisaged by the Attorney General must be built upon material obtained in preliminary investigations and examinations.

The issue herein presented arises out of the amendment to the General Business Law, Article 23-A, entitled "Fraudulent Practices in Respect to Stocks, Bonds and

Other Securities". This amendment was enacted by Chapter 961 of the Laws of 1960 and added definitions to section 352 as well as an entirely new section, "359-eee". Section 352, before the amendment and now, expressly authorizes the Attorney General to investigate practices involving "a course of business relating to * * * investment advice * * * which is fraudulent". The addition of the words "investment advice" enlarged the verbiage but query whether it extended the scope of the Attorney General's powers at least to the extent here sought to be exercised. Petitioner American Research Council, Inc., is registered as a professional investment advisor with the Securities and Exchange Commission of the United States. The question here presented is whether the book "How I Made $2,000,000 in the Stock Market" is "investment advice" by an "investment advisor". The issue is narrowed by the book itself and not by the advertising "blurbs" published, whether by Time Magazine, Barrow's financial reports of petitioner American Research Council, Inc., itself. The distinction must be drawn between "touting" stocks and advising purchasers what to buy on the one hand, and publishing a reported series of transactions by a named investor in the form of a biographic sketch with all the emphasis on the fiscal experiences of the purported author.

An "Investment Advisor" is defined by subdivision (a) of section 359-eee as "any person who, for compensation, engages in the business of advising members of the public, either directly or through publications or writing within or from the State of New York, as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities, or who, for compensation and as a part of a regular business issues or promulgates analyses or reports concerning securities to members of the public within or from the State of New

York * * *." There then follows a list of exceptions, those "not" included in the definition.

Section 352 of the General Business Law provides: "Whenever it shall appear to the Attorney General * * * that any person * * * shall have employed, or employs, or is about to employ, any deception, misrepresentation * * * in any practice or transaction or course of business relating to the * * * investment advice * * * which is fraudulent or in violation of law * * * he may in his discretion require or permit such person * * * to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate * * *." The power to subpoena witnesses and require production of books, &c., follows in subdivision 2 of section 352.

Who is an "investment advisor" and what is "investment advice"? Is every publication which sets forth the successive rises in stock prices which appear in the daily reports of security transactions, both on and off the exchanges, to be termed "investment advice"? Is every publication, however accurate or fictional, to be regarded as advice, if it in no instance urges the purchase or sale of specific securities? If in the biography of Bernard Baruch there are specific references to securities which were bought and sold, is the fact that the purported author has become wealthy to be deemed a yardstick for suppressing the book or subjecting author and publisher to Martin Act examination? To what unfathomable depths will this endeavor of the Attorney General lead us? Did the Legislature mean to enable any publication which describes transactions in securities and which might disclose who dealt in those securities? Did the Legislature mean to place in the Attorney General's power the

censorship power to suppress means that of publications unrelated to specific stocks or bonds but which espouse certain guiding principles of investment? The court notes the express exception of the publisher of a bona fide newspaper or news magazine by subdivision (4) of the exceptions enumerated in the definition. Therefore the following from a daily newspaper within the past few days is free from restriction: "Heard in Wall St. Genesco Inc.'s new process for making shoes, 'magic rim,', which will reduce the number of manual and machine steps needed in production, should improve future profit margins. Radio Shack Corp., which increased sales to $12.6 million and earnings to more than $1 per share in fiscal 1960, should see another sharp rise in sales and earnings, perhaps as much as 50 percent in the year to end June 30, 1961. Family Finance Corp., which made $2.40 per share in the fiscal year ended June 30, should make about $2.60 per share in the current year." Nothing in the book under discussion comes within range of such seemingly patent promotion of the specified stocks. Yet such comment is found daily in any number of publications.

The true definition of the term "investment advisor" may be found in the legislative records of the precursor and model of section 359-eee of the New York General Business Law. The Federal Investment Advisors Act of 1940 (15 U. S. C. section 80b-2 (a) (11)) finds expository analysis in the Congressional Record (86 Cong. Rec. 9809, 9813-14) in the remarks of Congressman Hinkshaw of California and Congressman Cole of Maryland, responsible for the House bill. Like analysis is in the Senate Banking and Currency Committee Report (Senate Bill 14108, the counterpart of H. R. 10065). "Investment advisors are in the relationship somewhat of a physician to his patient."

This court has read the book in question with care. Chapter One deals with the losses in cheap and unlisted Canadian mining and exploration stocks. Chapter Two explains how transactions in certain listed stocks were also quite unprofitable despite being conducted through established brokerage houses and on their "expert" advices. Only after sad experience does the author finally expound his "Box Theory" of fixing a price range and moving his selling price close to the purchase price within that range. All these transactions are in well-known stocks. Whether accurately told or not, the "round the world" experiences with daily cabled prices for specific stocks furnish an interesting tale. Cables and charts are in the "Appendix" to give strength to the purported author's experiences in the stocks thus purchased and sold. Surely, the Attorney General does not believe that the reading public, even avid dabblers in securities, will travel around the world and try such experiences as are related. The important fact is, however that the book does not "advise," does not pretend to foretell advances in stocks. It does describe a method used in specific transactions, actual or fictional, which turned out successfully for the author. I seriously doubt that this is investment "advice" within the reasonable intendment of the Federal or State securities statutes.

One may sympathize with persons who gamble and lose, whether at the races, at the roulette or dice tables of Reno, or on the stock market. No one has yet sought successfully to suppress the newspapers and other publications which carry daily "touting" on the horse races. But this book does not make any such recommendations. It does not warrant the Attorney General's using the Martin Act as a means of transport on a roving expedition. (Carlisle v. Bennett, 268 N. Y. 212; Dunham v. Ottinger, 243 N. Y. 423.) Since the Attorney General

confessedly wishes to suppress the book here at issue, his actions constitute an unwarranted invasion of the free press in violation of the Fourteenth Amendment of the Federal Constitution and Article 1, section 6, of the State Constitution. (People ex rel. Kenny v. Adams, 292 N. Y. 65; People v. Stending, 6 N. Y. 2d 214.) The popularity of the book—even its possible evil consequences to the gullible "investor" who might seek to invent his own method—these do not justify the action of the Attorney General, however praiseworthy his motivation. The Martin Act, and the new section 359-eee, will be so construed as to preserve its constitutionality. The book here at issue cannot reasonably be termed to be included in the definition of "investment advice." We thus sustain the statute and its definitions but bar actions sought to be taken thereunder which would violate sacred Constitutional safeguards.

The motion is granted, vacating and setting aside the ex parte order of this court, under date of December 7, 1960. Settle order.

Extract of Pertinent Provisions of New York General Business Law, Section 352

Investigation by Attorney General.—1. Whenever it shall appear to the Attorney General * * * that any person * * * shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating to the * * * investment advice * * * which is fraudulent or in violation of law, and which has operated

or which would operate as a fraud upon the purchaser * * * he may in his discretion either require or permit such person * * * to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate * * *.

Extract of Pertinent Provisions of New York General Business Law, Section 353

Action by Attorney General.—1. Whenever the attorney-general shall believe * * * that any person, partnership, corporation, company, trust or association has engaged in, is engaged or is about to engage in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, he may bring an action in the name and on behalf of the people of the state of New York against such person, partnership, corporation, company, trust or association, and any other person or persons theretofore concerned in or in any way participating in or about to participate in such fraudulent practices, to enjoin such person, partnership, corporation, company, trust or association and such other person or persons from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof or, if the attorney-general should believe from such evidence that such person, partnership, corporation, company, trust or association actually has or is engaged in any such fraudulent practice, he may include in such action an application to enjoin permanently such person, partnership, corporation, company, trust or association, and such other person or persons as may have been or may be concerned with or in any way participating in such fraudulent practice * * *. In said action an order or a

judgment may be entered awarding the relief applied for or so much thereof as the court may deem proper. Upon a showing by the attorney-general in his application for a permanent injunction hereunder that the defendant named in the action or an officer thereof has refused to be sworn or to be examined or to answer a material question or to produce a book or paper relevant to the inquiry when duly ordered so to do by the officer or judge duly conducting an inquiry into the subject matter forming the basis of the application for such injunction, such refusal shall be prima facie proof that such defendant is or has been engaged in fraudulent practices as set forth in such application and a permanent injunction may issue from the supreme court without any further showing by the attorney-general.

Provisions of New York General Business Law Section 354

Examination of witnesses and preliminary injunction. Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply

show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice act, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.

Provisions of New York General Business Law Section 358

Criminal prosecution.--The attorney general may prosecute every person charged with the commission of a criminal offense in violation of the laws of this state, applicable to or in respect of the practices or transactions which in this article are referred to as fraudulent practices. In all such proceedings, the attorney-general may appear in person or by his deputy before any court of record or any grand jury and exercise all the powers and perform all the duties in respect of such actions or proceedings which the district attorney would otherwise be authorized or required to exercise or perform; or the attorney-general may in his discretion transmit evidence,

proof and information as to such offense to the district attorney of the county or counties in which the alleged violation has occurred, and every district attorney to whom such evidence, proof and information is so transmitted shall forthwith proceed to prosecute any corporation, company, association, or officer, manager or agent thereof or any firm or person charged with such violation. In any such proceeding, wherein the attorney-general has appeared either in person or by deputy, the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so appearing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 534

AMERICAN RESEARCH COUNCIL, INC. and BERNARD MAZEL,

Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

The petitioner seeks a writ of certiorari to review a judgment of the New York Court of Appeals entered in this case on July 7, 1961, as amended by an order of that Court, dated October 5, 1961.

Opinions Below

The Supreme Court of the State of New York, New York County, wrote an opinion, which is not officially reported. 210 N.Y.S. 2d 332. The Appellate Division, upon affirmance, wrote a *per curiam* opinion, to which one justice dissented. 13 A. D. 2d 75, 213 N.Y.S. 2d 108. The New York Court of Appeals, upon reversal, wrote an opinion, three justices dissenting, which appeared in the official New York Reports in August, 1961. 10 N. Y. 2d 108, 176 N. E. 2d 402 (Appendix to the petition, pp. 12-35).

Jurisdiction

Jurisdiction is invoked under 28 U. S. Code § 1257(3).

Question Presented

The question which the petitioners seek to present is whether Article 23-A of the New York General Business Law (known as the Martin Act), as amended in 1960, violates the First and Fourteenth Amendment of the Constitution of the United States, if it is applied to permit an examination of witnesses by the New York Attorney General, to investigate whether fraudulent practices had been or were being employed in the promotion, advertisement and sale of a publication relating to an individual's dealings and methods of operating in the stock market.

The Statutes Involved

The sections of the Martin Act involved herein are General Business Law, §§ 352 and 354. Section 352 authorizes the Attorney General to investigate "any practice or transaction or course of business" relating to the sale of securities which is fraudulent or which he believes it to be in the public interest to investigate (Petition, pp. 31-32). Section 354 authorizes the New York Supreme Court to order persons mentioned in an application made by the Attorney General to appear before the court to answer questions or produce papers, documents or books concerning fraudulent practices as to which the Attorney General has determined to commence an action under the Martin Act (Petition, pp. 33-34).

Also referred to in the New York Court of Appeals opinion is General Business Law, § 359-eee (added by L. 1960, ch. 961), which defined "investment advisors", within the meaning of the Martin Act. The corporate

petitioner had been registered with the Securities and Exchange Commission as an "investment advisor" pursuant to the Federal Investors Advisory Act of 1940 (15 U.S.C., § 80-b). See the Appendix to the Petition for Certiorari (pp. 9-10).

Facts

The New York Attorney General sought to investigate certain practices engaged in by the petitioners in connection with the sale of a publication relating to the stock market practices of one Darvas. He obtained, pursuant to the usual procedure, an order of the New York Supreme Court dated December 7, 1960, permitting him to examine the petitioners (Petition, p. 26). That order was vacated, at petitioners' request, by the same Court (another justice presiding) by reason of the Court's erroneous assumption that the Attorney General's purpose was to suppress the book (Petition, pp. 30-31).

The Appellate Division recognized that there was no basis in the record for any concession that the Attorney General's aim was to suppress the book (Petition, p. 23). The Attorney General had denied any such purpose (90). But the Appellate Division held that the publication and its advertisements by the petitioners did not come within the purview of the General Business Law, §§ 352 and 359-eee being specifically mentioned (Petition, p. 22).

The Court of Appeals reversed, holding that the definition of "fraudulent practices" in the Martin Act was to be given a wide meaning to protect the public from deception. It defined broadly the scope of the Attorney General's powers under the statute (Petition, pp. 12, 15). It held that the New York lower courts had improperly applied to the Attorney General's "merely inquisitorial order" the measure of proof that would be required at a trial (Petition, p. 15). Compare *New American Library of W. L.* v. *Federal Trade Com'n*, 213 F. 2d 143 (2d Cir.,

1954), *Bantam Books, Inc.* v. *F.T.C.*, 275 F. 2d 680 (2d Circ., 1960), cert. den. 364 U. S. 819 (1960); and *Basic Books, Inc.* v. *F.T.C.*, 276 F. 2d 718 (7th Circ., 1960), where, under cease and desist orders, the Courts had occasion to review the *sufficiency of evidence* that misleading practices were being used in the sale of books.

ARGUMENT

No substantial federal question is presented by the petition. The judgment of the New York Court of Appeals merely sustained the New York Attorney General's power to investigate practices which he believed to be fraudulent in the advertisement, promotion and distribution of a publication being sold to the investing public. It did not purport to limit the petitioners' constitutional rights to publish works of fiction or autobiographical material.

The Court of Appeals did not sustain any suppression of the publication touted by the petitioners. Cf. *Koch* v. *Federal Trade Commission*, 206 F. 2d 311, 317 (6th Circ., 1953). It sustained the Attorney General's power to investigate the "practices, transactions and courses of business relating to the promotion, issuance and distribution of investment advice within and from the State of New York."

Although the petitioners urged that the order permitting the Attorney General to investigate would violate their First Amendment rights, there is nothing in the New York Court's order which reasonably could be understood to impose, as the petitioners assert (p. 7), any prior restraint upon the publication and distribution of books and writings; or to permit governmental control and suppression of ideas and beliefs. See *Trade Comm'n* v. *Education Society*, 302 U. S. 112 (1937), holding that laws may be made to protect the trusting as well as the suspicious.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., November 15, 1961.

Yours, etc.,

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